SUPREME COURT COPY

In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **FLOYD DANIEL SMITH,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S065233

San Bernardino County Superior Court Case No. FWV08607
The Honorable John W. Kennedy, Judge Presiding

RESPONDENT'S SUPPLEMENTAL BRIEF

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INTRODUCTION TO SUPPLEMENTAL BRIEF

On October 3, 2007, appellant filed an opening brief with this Court in the above-captioned matter. On May 29, 2008, respondent filed respondent's brief. On June 21, 2002, appellant filed a reply brief. Most recently, on March 17, 2017, appellant filed a Motion for Leave to File Appellant's Supplemental Opening Brief raising two additional issues not previously raised in his opening brief: (1) whether sufficient evidence supports the jury's finding that appellant committed a prior murder, and (2) whether California's death penalty scheme is constitutional. This Court granted appellant's motion and ordered appellant's supplemental opening brief filed on March 22, 2017. Respondent files this supplemental brief in response.

XI. SUFFICIENT EVIDENCE SUPPORTS THE PRIOR-MURDER SPECIAL CIRCUMSTANCES VERDICT

Smith contends the evidence was insufficient to support the jury's true finding on the prior murder special circumstance allegation because (a) the exhibits introduced at the bifurcated proceeding did not contain a photograph from which the jury could conclude he was the person described therein, (b) the documents within those exhibits were purportedly not certified, and (c) the exhibits did not mention a murder conviction. (ASOB at 11–20.) Each of Smith's arguments fails, as the evidence was more than sufficient for the jury to conclude that he committed a prior murder.

A. Standard of Review and Relevant Law

To determine the sufficiency of the evidence, reviewing courts assess whether the record "disclose[s] substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a

reasonable doubt." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357, citing *People v. Maury* (2003) 30 Cal.4th 342, 396.) Conflicts in the evidence and questions of credibility must be resolved in favor of the verdict, and courts should "indulge every reasonable inference the jury could draw from the evidence." (*People v. Wong* (2010) 186 Cal.App.4th 1433, 1444, citing *People v. Autry* (1995) 37 Cal.App.4th 351, 358.)

"A reversal for insufficient evidence is unwarranted unless it appears that upon no hypothesis whatever is there sufficient substantial evidence to support the jury's verdict." (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 357, quoting *People v. Bolin* (1998) 18 Cal.4th 297, 331, internal quotes omitted.) Reviewing the entire record "in the light most favorable to the prosecution," the question is "whether *any* rational trier of fact could have found the elements of the underlying enhancement beyond a reasonable doubt." (*Id.* at p. 357, emphasis in original.) "[T]he power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination . . . ." (*People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1363 [quoting *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874], emphasis omitted.)

This standard holds true even where the evidence upon which a jury relied was circumstantial. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

> Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court, which must be convinced of the defendant's guilt beyond a reasonable doubt. If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]

(*Ibid.*, internal quotations omitted.)

B. Relevant Law: Evidence to Consider at a Penal Code Section 190.1, subdivision (b), Proceeding

When determining the truth of a prior murder special circumstance in a capital case, the jury should look to the evidence presented at the trial and at the separate proceeding under Penal Code section 190.1, subdivision (b), where a prior murder special circumstance is alleged. (Pen. Code, § 190.4, subd. (a).) This is because a jury in any subsequent phase of a capital trial "shall . . . consider" evidence presented at a prior phase of the trial, so long as the jury at the subsequent phase is the same jury from the prior phase. (Pen. Code, § 190.4, subd. (d).)

This consideration of evidence from all phases makes sense at the separate proceeding under Penal Code section 190.1, subdivision (b). Section 190.1, subdivision (b), provides a statutory right to a capital defendant to separate this one special circumstance (out of the dozens of others) from the guilt phase. (Pen. Code, § 190.1, subd. (b).) The purpose is to prevent inflaming a jury with evidence of a prior murder conviction during their consideration of the defendant's guilt or innocence on the current murder charge or charges. (*People v. Farnam* (2002) 28 Cal.4th 107, 146.) In order to assure that the jury properly considers the evidence and deliberates as to the current charges, without the risk of being persuaded by a prior act of murder, the jury should not be given evidence of that prior murder (unless otherwise authorized under other evidentiary rules) during the guilt phase.

The risk of a jury being inflamed by evidence of a prior murder conviction after having already rendered a guilty verdict on the current charges is, at best, slim when the prior murder evidence is presented at a separate proceeding under Penal Code section 190.1. Moreover, if there were truly a risk that a jury would impermissibly consider evidence from the guilt phase in making this determination, then the Penal Code would not

assume the same trier of fact would make that determination. (Pen. Code, § 190.4, subd. (a) ["the trier of fact shall also make a special finding on the truth of each alleged special circumstance"].) This presumption that the same trier of fact—absent extraordinary circumstances—will consider all phases of a capital trial, supports the conclusion that the trier of fact can and should consider all of the evidence previously presented in prior phases of the case.[1]

C. The Evidence Established Smith Pled Guilty in 1984 to First-Degree Murder with a Firearm

The evidence, when examined in the light most favorable to the verdict, supports the jury's finding that Smith committed a prior murder within the meaning of Penal Code section 190.2, subdivision (a)(2).

The jury considered two packets of documents: Exhibit 24, which was the records from the California Department of Youth Authority in case number CR-22000, and Exhibit 63, which was excerpts from the Riverside County Superior Court files in case number CR-22000. Exhibit 24 included court minutes showing Smith's plea of guilty in 1984 to the charge of first-degree murder and admission of the firearm enhancement; fingerprints which Lita Holober testified were Smith's; and a description of Smith's confinement to the Youth Authority and his subsequent parole in 1991 and discharge in 1992 from the custody of the Youth Authority. (3 3SCT 787–793.) Exhibit 63 included court minutes showing Smith's initial plea of not guilty in 1984; his subsequent change of plea to guilty; the hearing at which the court sentenced him to a term of 25 years to life in the California Youth Authority; and a 1993 discharge order pursuant to Welfare and Institutions

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[1] Additionally, as a matter of practicality, without allowing the jury to consider the evidence presented at the guilt phase, witnesses would be required to appear multiple times to testify to the same facts. This practice would be a waste of judicial resources.

Code section 1772 expunging his conviction in case number CR-22000. (4 3SCT 1166–1183.)

These court and Youth Authority records establish that Smith committed a prior murder. Smith pled guilty to the murder. He never rescinded that guilty plea. He served his sentence, received parole from the Youth Authority, and was ultimately discharged from custody after successfully serving out his parole. Moreover, the jury heard testimony from Holober[2] that the fingerprints in the Youth Authority file were Smith's, and heard that Smith stipulated to having previously been convicted of a felony. (13 RT 3990–3991.) While it is true the discharge order contained in Exhibit 63 indicates the juvenile court converted his guilty plea to a not guilty plea and dismissed the case, the effect of that order under Welfare and Institutions Code section 1772 was a standard expungement of a juvenile record merely relieving Smith of the "penalties and disabilities" from the conviction—not a finding that Smith did not commit the 1984 murder. (Welf. & Inst. Code, § 1772.)

Viewing this evidence in the light most favorable to the verdict, a rational jury could conclude that Smith committed a prior murder within the meaning of Penal Code section 190.2. And none of Smith's remaining arguments undermines this finding by the jury.

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[2] The prosecutor told the jury, "[Exhibit] 24, was the document that was shown to Ms. Rice. It contains certified copies of the Defendant's fingerprints. Those fingerprints Ms. Rice compared with the Defendant and determined that in fact they were in fact the Defendant's fingerprints." (13 RT 5567.) However it appears that he misspoke. Rice collected fingerprints from Honess's apartment. (12 RT 3706–3709.) It was Holober, however, who was presented with Exhibit 24 during the guilt phase of the trial and compared Exhibit 24 (the Youth Authority records) to Smith's fingerprints from his booking card (Exhibit 23). (12 RT 3742–3744, 3746–3747.)

D. The Records Were Properly Certified

Smith contends that the records submitted to the jury were not properly certified. (ASOB 13–15.) Not only has Smith forfeited this argument, but it also fails on its merits. The Evidence Code presumes the authenticity of the certification of records, absent contrary evidence suggesting they were somehow not certified. Smith presented no such evidence, and the documents were properly certified, admitted, and considered by the jury.

1. Smith Forfeited Any Argument that the Exhibits Were Not Properly Certified

Smith's challenge to the exhibits as improperly certified—advanced as support for his sufficiency argument—is better understood as an evidentiary challenge that Smith should have raised below. Such an objection must be made at the trial, or it is forfeited. By failing to object, Smith forfeited that argument. (*People v. Geier* (2007) 41 Cal.4th 555, 609; see Evid. Code, § 353, subd. (a) [a judgment cannot be reversed on the basis of erroneously admitted evidence unless the defendant made a timely objection that "make[s] clear the specific ground of the objection or motion"].)

2. The Records Were Properly Certified

In any event, the Evidence Code presumes the propriety of certification unless evidence is presented to rebut that presumption. (See Evid. Code, §§ 604 [trier of fact must presume the existence of the presumed fact unless evidence is presented to support a finding of the nonexistence of that fact]; 664 ["[i]t is presumed that official duty has been regularly performed"]; 1530 [setting forth the requirements for certification of public records].) And a certified copy of an official record of conviction is admissible to prove the commission of the prior conviction or other act.

(Evid. Code, § 452.5.) For purposes of certification of those records, a "seal, signature, or other indicia of the court shall constitute adequate showing [that the copy was prepared and transmitted by the clerk of that superior court]." (Evid. Code, § 452.5, subd. (b)(2)(B).)

Evidence Code section 1530, enacted to create a "uniform rule that can be applied to all writings in official custody," (Cal. Law Revision Com. com., West Ann. Evid. Code § 1530) outlines the criteria for certification of public records as follows:

> (a) A purported copy of a writing in the custody of a public entity, or of an entry in such writing, is prima facie evidence of the existence and content of such writing or entry if: [¶] . . . [¶] (2) The office in which the writing is kept is in the United States . . . , and the copy is attested or certified as a correct copy of the writing or entry by a public employee, or a deputy of a public employee, having the legal custody of the writing . . . ."

(Evid. Code, § 1503, subd. (a)(2).) Because a deputy of a public employee can attest to or certify records, a clerk of court or other public official having custody of public records need not personally sign or certify records under Section 1530. (*Himmelmann v. Hoadley* (1872) 44 Cal. 213, 226 (*Himmelmann*); see also *Shaw v. Feehan* (1929) 207 Cal. 561, 566–567.)

Where a document is certified through the procedures outlined in section 1530, the contents of those documents are presumed to be true. As section 1530 further provides, "[t]he presumptions established by this section are presumptions affecting the burden of producing evidence." (Evid. Code, § 1530, subd. (b); see also Law Review Commission Comments ["Paragraphs (2) and (3) of subdivision (a) of Section 1530 set forth the rules for proving the content of writings in official custody by attested or certified copies"].) As such, "under sections 1530 and 452.5, subdivision (b), a properly certified copy of an official court record is a self-authenticated document that is presumptively reliable, and standing alone may be sufficient to prove a prior felony conviction." (*People v.*

Skiles (2011) 51 Cal.4th 1178, 1186.) Each of the exhibits here was properly certified in accordance with section 1530.

a. Exhibit 24

Exhibit 24 was signed by Kimberley L. Dornback "for Patricia A. Hagen." (3 3SCT 789.) As Hagen's deputy, Dornback's signature on behalf of Hagen satisfies the certification requirements under section 1530.

To the extent Smith's argument can be construed as one in which he challenges Dornback's status as Hagen's deputy because Dornback would otherwise have signed the letter herself, the argument fails. Courts have long recognized the relationships between public officials and deputies or other ministerial officers who "discharge[] official duties in the names of their respective principals." (*Himmelmann*, *supra*, 44 Cal. at p. 226.) And a principal is presumed to know and ratify the acts of her subordinates. (See e.g., *Shaw v. Feehan*, *supra*, 207 Cal. at pp. 566–567 [presuming that a principal is "thoroughly conversant with the acts of his subordinates, and therefore if he had not previously expressly authorized the signing of his name to said certificate by his secretary, that he acquiesced and approved such practice and thereby ratified the act of his secretary"].) The Evidence Code further presumes that an "official duty has been regularly performed," which must include the duty to certify documents. (Evid. Code, § 664.)

In *Himmelman*—a suit brought to recover assessments levied against property owners to cover the expenses of improving sidewalks—one of the parties sought to introduce copies of documents recorded in the Superintendent's office as evidence of the assessment. In finding the properly admitted, this Court held that a deputy may certify public records—even where that deputy is not identified as such in the records—where the official document is made in the name of the principal, the word "Deputy" is not made part of the signature, the certificate bears an official stamp, and the signature is genuine. (*Himmelmann*, *supra*, 44 Cal. at pp.

225–226.) So long as the deputy does not attribute his principal's title to himself, the body of the certificate shows that it was intended to be official, and the deputy signs the record "made in the name of his principal," it is properly certified. (*Id.* at p. 226.)

Similarly here, Dornback signed the letter certifying the Youth Authority's records regarding Smith's commitment to their custody. She signed it "in the name of [her] principal," she did not attribute Hagen's title to herself, and the body of the letter—a letter submitted on the Department of the Youth Authority letterhead in response to a request for Smith's commitment records—shows that it was intended to be official (i.e., "the attached documents are true and correct copies of the records in my custody"). (*Himmelman, supra*, 44 Cal. at p. 226.) While Smith does not challenge that Dornback was an employee of the Youth Authority—in fact, he assumes that she was Hagen's secretary—his argument assumes that Hagen did not authorize Dornback to sign for her. But he presented no evidence to this effect, which runs counter to the principle that Hagen is presumed to know and ratify the acts of her subordinates. (See e.g., *Shaw v. Feehan, supra*, 207 Cal. at pp. 566–567.) The letter was properly certified, properly admitted, and properly considered by the jury.

b. Exhibit 63

Exhibit 63, likewise, was properly certified. A seal of the Clerk of Court of Riverside County appears on the first page of the document, along with the signature of the clerk of court. Smith's argument rests on the premise that the records do not have an original signature. Not only is the record devoid of evidence that the signature on exhibit 63 is a "rubber stamp," as Smith argues, but he also cites no authority for the proposition that an original signature is required.

No such original signature is, in fact, required. Since at least 1881, this Court has recognized that an official may adopt a printed signature as

his own. (*Williams v. McDonald* (1881) 58 Cal. 527 [finding a printed signature by a clerk sufficient to meet the requirement of personal signature]; accord *Ligare v. California Southern R. R. Co.* (1888) 76 Cal. 610 [affixing the seal of the court to a form on which the clerk's name was appended amounts to an adoption of printed signature as his own].) Under that rationale, especially considered alongside Penal Code section 1530, subdivision (a)(2), where an official adopts a rubber stamp signature and either affixes it himself or authorizes a deputy to affix it to a document on his behalf, that signature is the lawful signature of the official. (Evid. Code, § 1530, subd. (a)(2) [authorizing deputies to certify on behalf of their principals].) And again, the law presumes that an official duty has been regularly performed. (Evid. Code, § 664.)

In the absence of contrary evidence—evidence which Smith did not present—the presumption must be that the Youth Authority (Exhibit 24) and the Riverside County Superior Court (Exhibit 63) regularly performed their duties in certifying these documents. (Evid. Code, § 604.) The documents were properly certified and properly admitted.

E. The Evidence Identified Smith as the Person Convicted of Murder in 1984

Smith also contends the exhibits introduced at the prior murder proceeding did not identify him as the person who committed the murder in 1984 because there were no photographs contained in the exhibits. (ASOB 15–16.) This argument rests on the premise that a jury cannot consider evidence from the prior guilt phase; however, as discussed previously, a trier of fact shall consider evidence from prior phases of a capital case in subsequent phases. (Pen. Code, § 190.4, subd. (d).) Here that means the jury could—and should—consider Holober's testimony from the guilt phase that Smith's fingerprints were contained in Exhibit 24 as well as

consider the stipulation that Smith had been previously convicted of a felony. (12 RT 3742–3747; 13 RT 3990–3991.)

Even if that were not the case, and as a result the jury here was not able to consider Holober's testimony or Smith's stipulation from the guilt phase, a photograph and fingerprints are not necessary to establish identity within court records. (*People v. Saez* (2015) 237 Cal.App.4th 1177, 1191, *reh'g denied* (July 14, 2015).) Absent "countervailing evidence, . . . *identity of a person may be presumed, or inferred, from identity of name.* [Citations.]" (*People v. Mendoza* (1986) 183 Cal.App.3d 390, 401, italics in original.) Even in cases where names are misspelled or a middle name is completely different, it has long been held in California under the doctrine of *idem sonans* that a trier of fact may presume that a name identifies a person, so long as the names are nearly identical in pronunciation. (*Ibid.*)

Here, Exhibit 24 contained Smith's name as well as a physical description of Smith from 1985 when the Youth Authority processed him into custody. In addition to listing his full name, "Floyd Daniel Smith,"[3] the documents identified him as a Black male, 5 feet 11 inches tall, 158 pounds, with brown eyes and black hair. (3 3SCT 790.) It also listed his date of birth (July 20, 1967), his place of birth (Banning, California), his place of residence, and his social security number (ending in -9078), along with noting physical characteristics, such as a scar between his eyes, and a scar on his right shin. (3 3SCT 790–791.) Smith presented no countervailing evidence to challenge that he was in fact the same Floyd Daniel Smith described in the exhibits. Presumably, if any of this identifying information was incorrect, evidence to rebut the presumption would have been

[3] The documents in Exhibit 24 occasionally list Smith's name as "Floyd Daniel Smith" and other times as "Floyd Daniel Smith, Jr." Both names are used interchangeably throughout Exhibit 24 in reference to the defendant in case number CR-22000. (3 3SCT 787–793.)

presented—such as a birth certificate, social security number, etc. It was not. From this information, therefore, a rational jury could conclude Smith was the same person as that described in Exhibit 24. (*People v. Mendoza*, *supra*, 183 Cal.App.3d at p. 401.)

F. The Exhibits Show Smith Pled Guilty to a First-Degree Murder with the Use of a Firearm in 1984

Smith's final contention, that the exhibits do not mention a murder conviction, is belied by the record. (ASOB 17–20.) Exhibit 24—a prison prior packet from the Department of Youth Authority—mentions a conviction for first degree murder at least three times. Exhibit 63—excerpts from the court files—mentions a conviction for first degree murder at least three times.

In Exhibit 24, the court minutes show that Smith was sentenced to a term of 25 years to life after he was convicted of, among other things, first-degree murder with a personal weapons use enhancement. (3 3SCT 788.) The court minutes reflect "conviction," and specifically lists "187PC (12022.5 PC) (1st deg) (Ct II)". (3 3SCT 788.) His intake fingerprint form indicates the charges were "MURDER, FIRST DEGREE; USE OF FIREARM." (3 3SCT 790.) The rap sheet shows the reason he was in the custody of the Youth Authority was for "187 PC-MURDER: FIRST DEGREE-USED FIREARM." (3 3SCT 792.)

In Exhibit 63, the Information shows that the Riverside District Attorney charged Smith with first-degree murder, with the use of a firearm. (4 3SCT 1168–1170.) Court minutes reflect that Smith was charged with and held to answer on, among other charges, "187/12022.5". (4 3SCT 1175.) Additional court minutes reflect the charge of first-degree murder (i.e., "187P.C.") (4 3SCT 1177), and Smith's withdrawal of his plea of not guilty following the entry of his plea of guilty to first-degree murder. (4 3SCT 1178.) And the sentencing order—which is a different copy of the same

document reflected in Exhibit 24 at page 788—shows Smith's sentence, confining him to the custody of the California Youth Authority for a period prescribed by law, specifically "25 years to life, plus two years." (4 3SCT 1180.)

While Exhibit 24 also includes an "Order of Discharge" that reflects "Honorable Discharge" and "No Violation," that same order shows that it was a discharge from the Youth Authority, indicating that Smith had successfully served his sentence.[4] (3 3SCT 789.)

And Exhibit 63's reference to a dismissal of the charges against Smith (4 3SCT 1182) is merely the expungement of Smith's juvenile record authorized by Welfare and Institutions Code section 1772—the very code section reflected on the order. And even though the order references "no violation," when taken together with Exhibit 24, that language more reasonably refers to Smith's conduct while on parole, i.e., that he committed no violation *of parole*, which allowed his discharge *from the Youth Authority*. The "no violation" language does not amount to a finding of innocence on the charge of murder.

While Smith might argue the expungement order effectively negates a conviction, that argument fails. As discussed previously (RB 105), an expungement under Welfare and Institutions Code section 1772 does not preclude the use of the expunged conviction to establish a penalty enhancement. Nor does it preclude the use of an expunged conviction to establish a special circumstance in a capital case.

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[4] The Discharge Order specifically states, "FLOYD DANIEL SMITH, JR. HAS BEEN DISCHARGED BY THE YOUTHFUL OFFENDER PAROLE BOARD" and further states, "THIS CERTIFIES THAT FLOYD DANIEL SMITH, JR. IS HEREBY DISCHARGED FROM THE YOUTH AUTHORITY UNDER Honorable CONDITIONS." (3 3SCT 789.)

The policy and purpose of expungement is rehabilitative. For juvenile convictions, it allows a youthful offender an opportunity to rehabilitate his behavior and to live a law abiding life after having made a poor choice as a child. However these rehabilitative purposes are not furthered by relieving an offender from the full impact of his later actions. (*People v. Daniels* (1996) 51 Cal.App.4th 52, 525.) Here, Smith's subsequent offense of murder shows he was not rehabilitated, and the prior conviction—even though expunged—can and should be used in determining a special circumstance. Having already killed one person, Smith—just three years after the Youth Authority discharged him from custody—made the decision to kill another person. The policy concerns underlying expungement to allow a youthful offender turn his life around no longer apply.

G. Harmless Error

To the extent this Court interprets any portion of Smith's argument as one challenging the admissibility of evidence, any error in presenting the jury with evidence of Smith's prior murder conviction was harmless. As previously argued, the jury correctly found true the special circumstance that Smith was "lying in wait" (Pen. Code, § 190.2, subd. (a)(15)), and evidence of Smith's prior murder conviction was admissible as an aggravating factor in the penalty phase, even absent a separate proceeding under Penal Code section 190.1, subdivision (b). (See RB at 109–110.) Additionally, the jury found true that Smith committed a felony when it convicted him of felony possession of a firearm under Penal Code section 12021, subdivision (a)(1). (2 CT 481.) So it is not reasonably likely that the jury would have found differently here. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

XII. *HURST V. FLORIDA* DOES NOT RENDER CALIFORNIA'S DEATH PENALTY STATUTE UNCONSTITUTIONAL

Smith also contends that California's death penalty statute violates the federal Constitution in light of *Hurst v. Florida* (2016) 136 S.Ct. 616, a recent United States Supreme Court decision invalidating Florida's capital sentencing scheme. (ASOB 21–38.) *Hurst* does not assist Smith because the "California sentencing scheme is materially different from that in Florida." (*People v. Rangel* (2016) 62 Cal.4th 1192, 1235, fn. 16.)

Under Florida's capital sentencing scheme, the maximum sentence a capital defendant could receive on the basis of a conviction alone was life imprisonment. A Florida trial court, however, had the authority to impose a death sentence if the jury rendered an "advisory sentence" of death and the court found sufficient aggravating circumstances existed. The United States Supreme Court held that this sentencing scheme violated *Ring v. Arizona* (2002) 536 U.S. 584, because the jury made an advisory verdict while the judge made the ultimate factual determinations necessary to sentence a defendant to death. (*Hurst v. Florida*, *supra*, 136 S.Ct. at pp. 621-622.) *Hurst* merely reiterates that juries, not judges, must "find each fact necessary to impose a sentence of death." (*Id.* at p. 619.)

In contrast, there are no judicial factfindings in California's death penalty scheme that could enhance a defendant's sentence beyond the prescribed range. In the recent *Rangel* decision, this Court discussed *Hurst* and distinguished California's capital case sentencing scheme from Florida's now-invalidated scheme:

> [A] [California] jury weighs the aggravating and mitigating circumstances and reaches a unanimous penalty verdict that "impose[s] a sentence of death" or life imprisonment without the possibility of parole. (Pen. Code §§ 190.3, 190.4.) Unlike Florida, this verdict is not merely "advisory." (*Hurst* at p. 622.) If the jury reaches a verdict of death, our system provides for an automatic motion to modify or reduce this verdict to that of life

> imprisonment without the possibility of parole. (Pen. Code § 190.4.) At the point the court rules on this motion, the jury "has returned a *verdict or finding* imposing the death penalty." (Pen. Code § 190.4, *italics added.*) The trial court simply determines "whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented." (Pen. Code § 190.4.)

(*People v. Rangel*, *supra*, 62 Cal.4th at p. 1235, fn. 16; accord, *People v. Jackson* (2016) 1 Cal.5th 269, 374.)

So unlike *Hurst*, Smith's death sentence was based on a jury's factual findings, and the jury's verdict was not merely "advisory." (*Hurst v. Florida*, *supra*, 136 S.Ct. at p. 622; *People v. Rangel*, *supra*, 62 Cal.4th at p. 1235, fn. 16.) The principles of *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Ring v. Arizona*, *supra*, 536 U.S. 584 are thus inapplicable to California's capital sentencing scheme. (*Rangel*, *supra*, 62 Cal.4th at p. 1235.) Because judges play *no* factfinding role in California's capital punishment scheme, *Hurst* does not render California's death penalty statute unconstitutional. (*Ibid.*)

Furthermore, as Smith acknowledges, *Hurst* did not address the standard of proof required for determining the aggravating and mitigating circumstances. (ASOB 26.) Thus, as this Court noted in *Rangel*, nothing in *Hurst* affects its decision on the standard of proof issue. (*People v. Rangel*, *supra*, 62 Cal.4th at p. 1235.)

CONCLUSION

For the foregoing reasons, as well as those reasons previously submitted to this Court in respondent's brief, respondent respectfully requests that the judgment be affirmed.

Dated: May 19, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Supplemental Brief, uses a 13 point Times New Roman font and contains 5,396 words.

Dated: May 19, 2017

XAVIER BECERRA
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Floyd Daniel Smith** Case No.: **S065233**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On May 19, 2017, I served the attached **Respondent's Supplemental Brief,** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 19, 2017, at San Diego, California.

L. Hernández
Declarant

L. Hernández
Signature

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